Supreme Court, U.S.
FILED
01 1312 MAR 5 2002
OFFICE OF THE CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

GRAY DAVIS, GOVERNOR OF THE
STATE OF CALIFORNIA,
Petitioner,

v.

DUKE ENERGY TRADING AND MARKETING, L.L.C.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit impermissibly narrowed this Court's holding in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), by ruling that the Eleventh Amendment does not bar a private federal action seeking to enjoin the Governor of California from exercising his emergency powers in a time of crisis to commandeer private property in order to protect the health and safety of California's residents?

2. Whether Court of Appeals for the Ninth Circuit improperly found that the Federal Power Act preempted the Governor of California from exercising his emergency powers to protect the health and safety of the residents of California from electricity shortages?

PARTIES BELOW

The California Power Exchange Corporation was the party below in addition to those named in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Gray Davis, the Governor of the State of California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit, Pet.App. A1–A34, is reported at 267 F.3d 1042. The Ninth Circuit's December 6, 2001 order denying the Governor's petition for rehearing appears at Pet.App. A39–A40. The order of the district court dismissing the action appears at Pet.App. A35-A36. The final judgment entered in the district court on remand appears at Pet. App. A37-A38.

JURISDICTION

The Ninth Circuit filed its initial opinion on September 20, 2001 (267 F.3d 1042). The Ninth Circuit denied rehearing on December 6, 2001. Governor Davis invokes the jurisdiction of

this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

(set forth verbatim in Appendix at A41-A47.)

United States Constitution, Amendment XI.

Federal Power Act, 16 U.S.C. §§ 824(a), 825*l*

California Emergency Services Act, California Government Code, §§ 8550, 8572, 8652.

STATEMENT OF THE CASE

1. The Importance of This Case

This case goes to the very heart of the concept of federalism. In 1996, California determined that it would deregulate its electricity markets. But in 2000 and 2001, California's experiment with deregulation went terribly wrong. The electricity crisis in California reached its peak in early 2001. During the height of the crisis, California experienced skyrocketing electricity prices as well as rolling electricity blackouts. The situation became so grave that Governor Davis invoked his emergency powers under California law to protect the public health and safety and commandeered energy contracts in order to assure that the power that could be provided under them would remain in California. Duke Energy Trading and Marketing ("Duke") then sued the Governor in federal court alleging that the Governor's action was in conflict with a Federal Energy Regulation Commission ("FERC")-approved tariff and thus was preempted. A divided panel of the United States Court of Appeals for the Ninth Circuit (with Judge Kozinski dissenting) reversed the district court's order dismissing the

action. The Ninth Circuit held that the Eleventh Amendment to the United States Constitution did not bar this action even though the court acknowledged that the Governor's action involved a core area of state sovereignty. The Ninth Circuit also found that the Governor's action was preempted and ordered judgment entered for Duke enjoining the Governor's orders commandeering the contracts. Thus, the Ninth Circuit granted relief which grossly interfered with the Governor's exercise of the state's police powers – a core area of state sovereignty.

Both in the district court and in the Ninth Circuit, Duke argued that it could maintain its federal court action pursuant to *Ex parte Young*, 209 U.S. 123 (1908). On the other hand, Governor Davis argued that this action was barred pursuant to the exception to *Young* which this Court established in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). The Ninth Circuit rejected the state's argument and effectively limited *Coeur d'Alene* to its narrow facts. In dissent, Judge Kozinski correctly noted, "If *Coeur d'Alene* does not cover this situation, then it must apply only where Indian tribes challenge the state's title to submerged lands and nowhere else." The Ninth Circuit has seriously misread *Coeur d'Alene* and has exacerbated a split in the circuits regarding the application of *Coeur d'Alene*. *See ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999) (holding that *Coeur d'Alene* applies whenever the relief requested intrudes upon a state's "dignity and status as a sovereign government."). Only this Court can correct the Ninth Circuit's misinterpretation of *Coeur d'Alene*.

The Ninth Circuit then addressed the question of whether a FERC-approved tariff preempted the Governor's actions and found that the Governor's actions were preempted. In so holding, the Ninth Circuit did not consider the various tariff provisions which provide that California law governs the tariff

and rate schedules. Nor did the Ninth Circuit give weight to the Federal Power Act's provisions which preserved the rights of states to regulate.

The Ninth Circuit has hamstrung the ability of this governor and future governors to respond to a crisis. In effect, the Ninth Circuit has determined that the federal courts will second guess the states' exercise of their police powers in emergency circumstances. This Court should rectify this situation so that California's governor – and other state governors – can act to protect their states' residents in crises.

2. Background of the Case

In 1996, California began its experiment with a deregulated market for electricity. In September 1996, the California Legislature enacted Assembly Bill 1890 ("AB 1890") in order to restructure California's electrical markets by bringing competition to those markets. Among other changes, AB 1890 established the California Power Exchange Corporation ("CalPX") as a nonprofit public benefit corporation to operate as a utility under FERC regulation. The CalPX served as the market for the sale of wholesale electricity between generators and marketers (such as Duke) to retail utilities such as Pacific Gas and Electric Company ("PG&E") and Southern California Edison ("SCE"). Because the CalPX dealt in wholesale transactions for electricity in interstate commerce, it was subject to a tariff which it submitted to FERC for approval.

In August 2000, the CalPX began acting as the market for future contracts for electricity which were for periods of a month or more, *i.e.*, the block forward market ("BFM"). The CalPX Trading Services Second Revised Rate Schedule FERC No. 1 ("CTS Rate Schedule") specified the terms of these contracts. The CalPX created the BFM contracts through matching bids to

buy and sell power and also served as the clearinghouse for payments under the BFM contracts. The contracts at issue here guaranteed PG&E and SCE the right to buy specified amounts of electricity from various suppliers (including Duke), at a set price, six days a week through the end of 2001. These prices were well below the prevailing prices in the California energy market at that time. These contracts expired on December 31, 2001. Pet.App. at A4-A6.

In the second half of 2000 and in early 2001, the AB 1890 experiment with deregulation went terribly awry. The price of electricity soared, and the state experienced rolling power blackouts. On January 17, 2001, as a result of the critical electricity shortage in California, Governor Davis declared a state of emergency based on an imminent threat of widespread and prolonged disruption of electrical power which constituted a condition of extreme peril to the safety of Californians. Pet.App. at A48-A51.

Pursuant to his powers under California's Emergency Services Act, California Government Code section 8550, et seq., on February 2 and 5, 2001, the Governor issued two Executive Orders which commandeered "contracts and trades for electricity (known as the 'block forward' market) for the delivery of electricity" held by PG&E and SCE. Pet.App. at A51-A54.[1]

The Governor commandeered the contracts because the State's energy shortage had resulted in unanticipated power outages, threatening the health and safety of California residents, critical services in the State, and vital sections of California's

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1. The California Emergency Services Act specifically authorizes the Governor to commandeer private property during a state of emergency and provides that "the state shall pay the reasonable value thereof." *See* Cal. Gov't. Code § 8572 (West 1992).

economy. Thus it was "necessary for the State to take control of the block forward market contracts to ensure a sufficient and continuous supply of electricity to meet California's energy needs and to mitigate the effects of th[e] energy shortage." Pet.App. at A52, A54. Even though Duke was being paid under the contracts, it wanted the contracts liquidated (*i.e.*, terminated) so that it could sell its electricity on the open market (either inside or outside California) at far higher prices which would have further exacerbated the energy crisis. Had the Governor not seized the contracts, the CalPX would have liquidated them and the energy guaranteed to California under these contracts would have been lost to the state. And even a minor loss of electricity could have resulted in further blackouts.

In March 2001, the CalPX filed a claim with the California Victim Compensation and Government Claims Board for money representing the "liquidation value" of the BFM contracts. Pet.App. at A9.[2] The CalPX filed the claim for itself and for all market participants on whose behalf it had the right to liquidate the BFM contracts (which would include Duke). Throughout this litigation, the state paid Duke for electricity according to the terms of the BFM contracts, and through the proceedings before the Claims Board, Duke's claim to recover the liquidated value of the BFM contracts has been preserved.[3]

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2. The California Emergency Services Act requires that a claim be presented to the Claims Board before the state can reimburse any person whose property was taken. *See* Cal. Gov't. Code § 8652 (West 1992).

3. In fact, the CalPX, PG&E and Reliant Energy Services have filed inverse condemnation actions against the State seeking the "liquidated value" of the BFM contracts. Those actions have been coordinated in the Superior Court for Sacramento County as Judicial Council Coordination Proceeding No. 4203. These filing demonstrate that the parties understood that their rights under the contracts are governed by state (not federal) law.

3. Proceedings Below

On February 8, 2001, Duke initiated this action for declaratory and injunctive relief against Governor Davis and the CalPX claiming to be one of the suppliers under the BFM contracts. Duke claimed that when Governor Davis commandeered the BFM contracts, SCE and PG&E had already defaulted on their obligations to pay hundreds of millions of dollars for power purchased through the CalPX. Duke then alleged that because the BFM contracts served as security for the defaults on these payments, Governor Davis' seizure of the BFM contracts deprived Duke and other suppliers of their liquidation remedy under the FERC-approved tariff applicable to the CalPX.

Relying on these allegations, Duke claimed that Governor Davis had violated the Supremacy Clause because commandeering the BFM contracts under the state Emergency Services Act: (1) interfered with wholesale power contracts that are committed by federal law to exclusive federal jurisdiction, and (2) violated the Federal Power Act and federal tariffs.

On April 30, 2001, the district court granted Governor Davis' motion to dismiss on sovereign immunity grounds. Duke appealed, and on September 20, 2001, a divided panel of the Ninth Circuit reversed.

In the majority decision, the Ninth Circuit held that the Eleventh Amendment did not bar Duke's action against Governor Davis because it did not fall within the exception to *Ex parte Young*, 209 U.S. 123 (1908), which this Court established in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). The Ninth Circuit stated that it could not "disagree with Governor Davis' characterization of the exercise of his emergency powers to take private property for the public's benefit and safety as a core state sovereignty area – undoubtedly it is." Pet.App. at

A20-A21. The Ninth Circuit then reframed the question as "whether granting Duke the relief it seeks would be 'so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself.'" *Id.*, quoting from *Aqua Caliente Band of Cahuila Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000), *cert. denied* 121 S.Ct. 1485 (2001). The Ninth Circuit did indicate that *Coeur d'Alene* "might well apply," if Duke were requesting relief "that would permanently divest the Governor of his future ability to invoke his emergency powers or remove an entire area over which he could previously use his powers." Pet.App. at 23. But it also stated that *Coeur d'Alene* is "limited to its 'particular and special circumstances.'" Pet.App. at A22, n.8.

At the invitation of the parties, the Ninth Circuit then proceeded to address the merits of Duke's claim that the Federal Power Act preempted the Governor's commandeering of the BFM contracts. Relying on the filed rate doctrine, the Ninth Circuit indicated that it believed that FERC's jurisdiction over the BFM contracts was plenary and exclusive. The court then held that the Governor's commandeering orders "directly nullify the security and default mitigation provisions of the FERC-approved CTS rate schedule, and hence cross the 'bright line' between state and federal jurisdiction established by the [Federal Power Act]." Pet.App. at A26-A27. The Ninth Circuit stated:

> Of course, because the block forward contracts were within FERC's authority, Governor Davis could not simply have decreed that the IOU's [PG&E and SCE] debts to their wholesale suppliers be forgiven. And yet his commandeering orders, which in both purpose and effect frustrated the wholesale suppliers' ability to receive at least partial payment for the IOU's past purchases of electricity, were the functional equivalent of such an obviously impermissible decree.

Pet.App. at A28. The court found that the Governor's orders were thus void under the Supremacy Clause of the United States Constitution. The court remanded the case to the district court with instructions that judgment be entered in favor of Duke. Pet.App. at A32.

In his dissent, Judge Kozinski addressed only the Eleventh Amendment. He recognized that the Governor was acting in a major emergency which had affected "the health, safety, welfare and comfort of the people of California," and which affected not only the price of electricity, "but its very availability." "For the first time in its history, the state was confronted with rolling blackouts which themselves caused serious disruptions; there was good reason to believe that far worse was in store." Pet.App. at A33.

As Judge Kozinski stated:

> Plaintiff . . . asks the court to second-guess the actions of the Governor, taken for the purpose of averting what he reasonably believed to be an impending power catastrophe. A more pointed interference with the state's essential sovereign interests by the federal courts is hard to imagine. . . . If *Coeur d'Alene* does not cover this situation, then it must apply only where Indian tribes challenge the state's title to submerged lands and nowhere else. Unlike the majority, I cannot read *Coeur d'Alene* quite so narrowly.

Pet.App. at A34.

The Ninth Circuit has unduly narrowed state sovereignty by holding that a federal suit challenging the Governor's exercise of his emergency powers in a time of crisis can never be barred by the Eleventh Amendment because the relief sought would not

result in a permanent divestiture of that sovereignty. We agree with Judge Kozinski that *Coeur d'Alene* should not be read so narrowly. Moreover, the Ninth Circuit – elevating Duke's financial concerns over the health and safety of Californians – improperly found that the Federal Power Act and the FERC-approved tariffs preempted the Governor's orders.

4. The Case is Not Moot.

Although the contracts at issue here expired on December 31, 2001, this Court should review this matter because it presents a situation which is capable of repetition yet evades review. *See Honig v. Doe*, 484 U.S. 305, 318 (1988); *Press-Enterprise Company v. Superior Court of the State of California*, 478 U.S. 1, 6 (1986). Here, in a time of crisis, the Governor acted to protect California's residents by commandeering the BFM contracts to prevent their liquidation. By their nature, these contracts are for relatively short periods of time, *e.g.*, one to two years. It is not at all unusual for the courts to accept jurisdiction to review disputes over contracts even though they have expired. *See, e.g., Burlington Northern Railroad Company v. Surface Transportation Board*, 75 F.3d 685 (D.C. Cir. 1996) (expired contracts reviewed); *California Energy Resources Conservation and Development Commission v. Bonneville Power Administration*, 754 F.2d 1470 (9th Cir. 1985) (same); *see also The Humane Society of the United States v. Environmental Protection Agency*, 790 F.2d 106 (D.C. Cir. 1986) (expired permits reviewed). Similarly, as is the case here, the Governor's emergency actions are relatively short term, and thus they may be concluded before judicial review can be completed.

In addition, this situation is capable of repetition. *See Honig, supra*, 484 U.S. 318, fn. 6 ("Our concern in these cases, as in all others involving potentially moot claims, was whether the controversy was *capable* of repetition and not . . . whether .

. . a recurrence of the dispute was more probable than not."); emphasis in original. In the event the Governor of California will need to take property in the future during a crisis, it is reasonably likely that a party whose property has been taken will seek to invoke the jurisdiction of the federal courts to enjoin the Governor's actions. Unless this Court reviews the decision of the Ninth Circuit now, this sort of short-lived situation will always evade review, restricting the Governor's ability to respond to real crises.

REASONS FOR GRANTING THE PETITION

I

THE *COEUR D'ALENE* EXCEPTION TO *EX PARTE YOUNG* IS APPLICABLE AND THUS THE ELEVENTH AMENDMENT BARS THIS ACTION

This action arose during extraordinary circumstances. In late 2000 and early 2001, California's energy market spiraled into chaos with the price of electricity skyrocketing and with the state experiencing rolling electricity blackouts. Faced with these circumstances, Governor Davis declared a state of emergency, and pursuant to that declaration, the Governor commandeered power contracts that were on the verge of being liquidated. The Governor acted in order to preserve for California the electricity which was to be provided under those contracts and thus to protect the public from even more severe energy shortages. The decision of the Ninth Circuit, however, allows a private party to sue the Governor in federal court for declaratory and injunctive relief to void the Governor's emergency actions. In effect, the Ninth Circuit has granted the federal courts the authority to second-guess the emergency actions of the Governor. With all due respect, the Eleventh Amendment should bar this action.

A. The Ninth Circuit's Decision Conflicts With the Tenth Circuit.

The Ninth Circuit's decision here further aggravates the split between the Ninth and Tenth Circuits on the breadth of *Coeur d'Alene*. In *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999), the Tenth Circuit found that *Coeur d'Alene* was applicable to taxpayers' federal action for equitable relief alleging state property tax valuations violated federal equal protection and due process rights. That court held that the "state's interests in the integrity of its property tax system lie at the core of the state's sovereignty." *Id.* at 1193. The *ANR Pipeline* court concluded, "The relief sought by the pipelines impermissibly intrudes upon Kansas' 'dignity and status' as a sovereign government." *Id.* at 1194.

Here, the relief which Duke sought is at least as intrusive as that which the plaintiffs sought in *ANR Pipeline*. That is, Duke sought to bar the Governor from an exercise of his emergency powers during a crisis. Certainly that relief "impermissibly intrudes upon [California's] 'dignity and status' as a sovereign government" such that the case truly is against the state itself.

B. *Coeur d'Alene* Should Apply to the Governor's Exercise of Emergency Powers.

This case presents a critical issue concerning the application of the *Coeur d'Alene* exception to *Ex parte Young*. As Judge Kozinski noted in his dissent, if *Coeur d'Alene* does not apply here, then it will only apply when an Indian tribe challenges a state's title to submerged lands. *Coeur d'Alene* must have a broader application.

In *Coeur d'Alene*, it was the unique divestiture of the state's broad range of controls over its own lands that made the *Ex parte*

Young exception to sovereign immunity inapplicable. Here, the state's ability to control the impact of its own statutes that created the deregulated markets in California is no less sovereign. And very little is more sovereign than taking private property for the public benefit and safety during a time of crisis – in particular a crisis that has its roots in the state's own laws. As in *Coeur d'Alene,* Duke's action seeks to divest the state of this sovereignty and should be barred under the Eleventh Amendment.

The scope of the emergency which California confronted cannot be minimized. By the time that the Governor commandeered the BFM contracts, many parts of the State had experienced rolling electricity blackouts with the prospect of many more to follow. Thus, it was critical to the health and safety of the state's population that all possible sources of electricity be secured. Even a small decrease in available electricity could have lead to further blackouts affecting California's citizens. As Judge Kozinski noted:

> The emergency affected not merely the price of electrical power, but its very availability. For the first time in its history, the state was confronted with rolling blackouts which themselves caused serious disruptions; there was good reason to believe that far worse was in store.

Pet.App. at A33.

The Ninth Circuit indicated that it believed that *Coeur d'Alene* might apply "[i]f Duke were requesting relief that would permanently divest the Governor of his future ability to invoke his emergency powers or remove an entire area over which he could previously use his powers, ..." Pet.App. at A21. But that is exactly the impact of the Ninth Circuit's decision. Duke

sought an order barring the Governor from acting to protect the health and safety of California's citizens at a specific time during a statewide emergency. The Ninth Circuit responded by granting Duke that order, finding it does not offend a core area of state sovereignty because Duke was not seeking relief that would divest the Governor permanently of all his emergency powers. However, the Ninth Circuit has divested the Governor of his authority to respond to a specific and extreme crisis existing in California's deregulated energy markets. Before the Ninth Circuit's decision, no one could possibly have questioned any governor's power to act to keep the lights on during a time of crisis. Now, no governor can exercise those powers if that action may implicate the finances of a federally-regulated energy supplier.

The logic of that ruling is difficult to grasp. Any crisis is immediate and specific. Yet, in the Ninth Circuit's view, a federal court can block the Governor's exercise of his emergency powers to address that situation and still avoid offending core state sovereignty. For the Ninth Circuit, a federal court can do so because its ruling is not a permanent divestiture of state sovereignty that precludes the Governor from ever exercising his emergency powers. Rather, under the Ninth Circuit's analysis, no core sovereignty interest is offended when the federal court prevents the Governor from acting to protect the public in a specific instance requiring the immediate exercise of his emergency powers. The Ninth Circuit's rationale is illusive.

In dissent, Judge Kozinski correctly noted that if *Coeur d'Alene* did not apply here, then it must apply only to the specific facts presented in *Coeur d'Alene*, *i.e.*, only where Indian tribes challenge a state's title to submerged lands. Indeed, the Ninth Circuit indicates that *Coeur d'Alene* is so limited. Pet.App. at A22, n.8. Surely, if *Coeur d'Alene* is to be limited to its specific facts, then this Court should make that decision.

II

THE FEDERAL POWER ACT DOES NOT PREEMPT THE GOVERNOR'S ACTIONS.

Governor Davis exercised his emergency powers in response to an unprecedented energy crisis that threatened the health, safety, and welfare of the people of California. However, the Ninth Circuit's decision on preemption undercuts the Governor's ability to respond to that crisis. In its opinion, the Ninth Circuit found that the Governor's actions to protect the public were preempted because they conflicted with the security and default mitigation provisions of the CalPX tariff. Pet.App. at A27. The Ninth Circuit's decision seems premised on its concern that in protecting the health and safety of Californians, the Governor had acted in a manner which would result in Duke not receiving payments which were due to it but that PG&E and SCE had not made because of their weakened financial condition. Pet.App. at A28. In elevating the financial concerns of Duke over the health and safety of California's citizens, the Ninth Circuit erred.[4]

Of course, when a state's action conflicts with, or frustrates, federal law, the state must give way. *CSX Transportation, Inc. v.*

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4. The Ninth Circuit's concerns about Duke receiving payment were also misplaced. As noted *supra*, under the California Emergency Services Act, the state is to pay the reasonable value of property which is commandeered. Cal. Gov't Code § 8572 (West 1992); Pet.App. at A46. Moreover, as the Emergency Services Act requires, the CalPX has filed a claim with the California Victim Compensation and Government Claims Board for what the CalPX claims is the liquidated value of the BFM contracts. If that claim is denied, the CalPX can pursue state court litigation to recover any amounts the state legitimately owes for taking the contracts. In turn, the CalPX will be able to make payments to the market participants who are owed money – including Duke. Thus California has provided mechanisms for awarding compensation which will protect Duke's security interests.

Easterbrook, 507 U.S. 658, 663 (1993). This Court has also acknowledged that "[i]n the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *Id.* at 663-64; *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons"). Moreover, this Court has also noted that the indirect economic impacts of a state's action in an area subject to federal regulation were insufficient to lead to preemption of that state action. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 659-61(1995) (in the context of ERISA).

Additionally, this Court has long recognized a state's sovereign right to take private property for a public purpose, particularly in times of emergency. *See, e.g., New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 723 (1836). The state's ability to act when the public's health, safety or welfare is threatened is so critical that there is a presumption that the "historic police powers of the States [are] not to be superseded by . . . [f]ederal [a]ct unless that [is] the clear and manifest purpose of Congress." *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *see also California Division of Labor Standards Enforcement v. Dilligham Construction, N.A., Inc.*, 519 U.S. 316, 325 (1997) ("the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). Moreover, the reasonable exercise of the protective power of the state is also read into all contracts. *Home Bldg & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 444 (1934).

The Ninth Circuit conceded that California has an important

interest in ensuring a reliable and affordable supply of electricity and that the Governor's exercise of the state's emergency powers to take private property for the public's benefit and safety was an area of core state sovereignty. Pet.App. at A20-A21. Yet the Ninth Circuit then abandoned that acknowledgment, did not consider that the contracts were governed by California law, and chose instead to analyze the Governor's actions as an interference with contractual security provisions. Then the Ninth Circuit allowed the possible indirect economic impacts of the Governor's actions on Duke to trump the need to protect California's residents. And the Ninth Circuit found that FERC's exclusive jurisdiction over interstate wholesale electricity prices preempted the Governor's emergency actions because they conflicted with the tariff's security provisions. Pet.App. at A30.

The Ninth Circuit's analysis reflects several fundamental errors. In deciding whether the Governor's action conflicted with the security and default provisions of the CalPX tariffs, the Ninth Circuit ignored the emergency nature of the Governor's action and failed to consider the relevant issue, *i.e.*, whether, through the Federal Power Act ("FPA"), Congress intended to preempt the state's exercise of its police powers to protect the health, safety and welfare of its residents. The FPA is devoid of any clear and manifest congressional intent to preempt the state's police power to protect the public's health, safety and welfare in a time of crisis.

In fact, it is settled that the FPA is not completely preemptive. After analyzing the legislative history of the FPA, the Court of Appeals for the District of Columbia Circuit concluded that Congress did not intend to occupy the field in enacting the FPA. *First Iowa Hydro-Elec. Co-op v. Federal Power Comm'n*, 151 F.2d 20 (D.C. Cir. 1945), *rev'd on other grounds*, 328 U.S. 152 (1945). That court stated:

> In enacting the Federal Power Act, it was not the intention of Congress that the Federal government should occupy the field completely, or that the states should be excluded. On the contrary, the Act contemplates a dual system of control and the exercise of appropriate powers by the State, as well as by the Federal government. This is the plain purpose of Section 9(b).

Id. at 23-24; footnotes omitted. In addition, to this legislative intent, Congress expressly provided in the FPA that "Federal regulation of [the] transmission and sale of electric energy . . . extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a); Pet.App. at A41. Thus, not only does the FPA not contain express preemption language, it contains language protecting areas "subject to the regulation by the States." The protection of the health, safety and welfare of the public has always been a matter of state regulation.

Beyond failing to consider whether the FPA completely preempts state law, the Ninth Circuit also erred in determining that FERC had exclusive jurisdiction over these specific matters. Although it was purporting to protect the FERC-approved tariff, at no time did the Ninth Circuit look to the tariff itself to determine what law governed the terms of the tariff. The CalPX tariff, which the Ninth Circuit purported to be applying, expressly states, "This Tariff shall be governed by and construed in accordance with the law of the State of California, except its conflict of laws provisions; . . . ." California Power Exchange Corporation, FERC Electric Service Tariff No. 2, Pet.App. at A55. Moreover, the CTS Rate Schedule applicable to the BFM contracts also provided that California law governed. *See* CTS Rate Schedule, Paragraph 12.6, Pet.App. at A56. The fact that California law (which would include the California Emergency Services Act) was to govern both the CalPX tariff and the CTS

Rate Schedule undermines the Ninth Circuit's determination that FERC had exclusive jurisdiction over the CTS rate schedules.[5]

Given that the FPA was intended only to extend to those matters which were not subject to regulation by the states, there is no basis to conclude that Congress intended to preempt the exercise of the state's police powers during a crisis such as Governor Davis faced here. Moreover, given that the CalPX tariff and the CTS rate schedule are to be governed and construed according to California law, the Ninth Circuit could not reasonably conclude that FERC had exclusive jurisdiction over the security provisions in the rate schedule.

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5. Paragraph 12.6 of the CTS rate schedule does contain an exception that allows for the application of federal law when FERC has exclusive jurisdiction. *See* CTS Rate Schedule, Paragraph 12.6; Pet.App. at A56. However, if FERC had exclusive jurisdiction, then Duke was required to file its complaint with FERC and to preserve its right to seek appellate review of any FERC decision in the appropriate court of appeals. *See* 16 U.S.C. § 825*l*(b) (providing exclusive jurisdiction in the courts of appeals for appeals from FERC orders); Pet.App. at A42-A43. By bringing its action in the district court, Duke conceded that FERC did not have exclusive jurisdiction. Duke cannot have it both ways. Either the commandeering of the contracts was not within the exclusive jurisdiction of FERC, and California law applies; or the commandeering was in the exclusive jurisdiction of FERC, in which case the district court did not have jurisdiction.

CONCLUSION

Governor Davis commandeered these contracts in order to protect Californians who were in the midst of the most serious energy crisis in state history. The federal courts should interfere with such an exercise of the police powers only with great reluctance. Because the Ninth Circuit showed no such reluctance, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DUKE ENERGY TRADING AND MARKETING, L.L.C., Plaintiff-Appellant, v. GRAY DAVIS, Governor of the State of California, Defendant-Appellee, and CALIFORNIA POWER EXCHANGE CORPORATION, Defendant.	No. 01-55770 D.C. No. CV-01-01252-TJH OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Chief District Judge, Presiding

Argued and Submitted August 16, 2001
San Francisco, California

Filed September 20, 2001

Before: Harlington Wood, Jr.,* Alex Kozinski, and Diarmuid F. O'Scannlain, Circuit Judges

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* Honorable Harlington Wood, Jr., Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

Opinion by Judge O'Scannlain

O'SCANNLAIN, Circuit Judge:

We must decide whether a wholesale energy supplier is entitled to injunctive relief from orders issued by the Governor of California commandeering its contractual rights to deliver electricity to public utilities within the state.

I

A

The electricity contracts at issue in this appeal are the products of the restructuring of the California electricity market, which commenced with the 1996 passage of Assembly Bill 1890 ("AB 1890"). 1996 Cal. Legis. Serv. 854 (West). AB 1890 called for the creation of the California Power Exchange ("CalPX"), a nonprofit entity that would provide an initially-mandatory auction market for the trading of electricity.[1] Electricity Restructuring Act § 1(c). The CalPX was deemed a public utility under the Federal Power Act ("FPA"); hence, it was subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC") and operated pursuant to FERC-approved tariffs and FERC-approved wholesale rate schedules.[2] *Pac.*

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[1] Additional background information on the CalPX can be found in our opinion in *In re Cal. Power Exch.*, 245 F.3d 1110 (9th Cir. 2001).

[2] Under the FPA, FERC has jurisdiction over "the sale of electric energy at wholesale in interstate commerce," i.e., sales of electricity for resale. 16 U.S.C. § 824(b), (d). A "public utility" is defined under the FPA as "any person who owns or operates

Gas & Elec. Co., 77 FERC ¶ 61,204, at 61,803-05 (Nov. 26, 1996).

The CalPX commenced operations in March 1998. Initially, it operated only a single-price auction for day-ahead and day-of electricity trading (the "CalPX Core market"). In the summer of 2000, it opened its CalPX Trading Services ("CTS") division to operate a block forward market by matching supply and demand bids for longer-term electricity contracts ("block forward market" contracts or "BFM" contracts). AB 1890 required the three main investor-owned utilities ("IOUs") in California – Southern California Edison ("SCE"), Pacific Gas & Electric ("PG&E"), and San Diego Gas & Electric ("SDG&E") – to conduct virtually all of their electricity trading in the CalPX markets for a transition period. *See In re Cal. Power Exch.*, 245 F.3d at 1114-15.

Beginning in the summer of 2000, wholesale prices for electricity in the California market increased dramatically. *See id.* at 1115-16. Prices in the CalPX markets spiked particularly sharply. *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121, at 61,353 (Nov. 1, 2000). PG&E and SCE, which were still subject to a retail rate freeze provided by AB 1890, incurred billions of dollars of debt because they were unable to pass their wholesale power costs on to their customers. *See id.* In January 2001, SCE and PG&E defaulted on hundreds of millions of dollars of obligations to the CalPX for December and January purchases

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facilities subject to the jurisdiction of the Commission under this part." *Id.* § 824(e). The California Public Utilities Commission has jurisdiction over all retail sales of electricity in California.

in the CalPX Core and CTS block forward markets, including an outstanding debt of approximately $37 million for energy purchased through CTS from Duke. On January 18, 2001, following the downgrading of PG&E and SCE's debt ratings to "junk" status, the CalPX suspended trading privileges for the two IOUs.

The default of PG&E and SCE had a severe impact on the CalPX, as they were two of the largest CalPX participants. At the end of January 2001, the CalPX suspended trading in both its Core and CTS block forward markets and commenced wrapping up its operations. It filed for protection under Chapter 11 of the Bankruptcy Code on March 9, 2001. PG&E filed for bankruptcy on April 6, 2001.

B

The CTS block forward contracts at issue in this appeal are contracts between wholesale suppliers such as Duke, on the one hand, and SCE and PG&E, on the other, for the delivery of electricity through December 31, 2001. The CalPX CTS served as an intermediary between buyers and sellers, matching supply and purchase bids submitted by CTS participants. The CalPX also served as a clearinghouse for payments and scheduled physical delivery of the electricity purchased through its CTS division. Duke was the largest single supplier of electricity in the CTS block forward market, accounting for nearly 43% of all CTS trades.

The contracts created through CTS's matches incorporate the provisions of the FERC-approved CalPX CTS Second Revised Rate Schedule FERC No. 1 ("CTS Rate

Schedule"). Section 5 of the CTS Rate Schedule provides certain creditworthiness requirements for all CTS participants. These include an acceptable credit rating, collateral requirements, and other minimum financial conditions.

In the event of a default, the CTS Rate Schedule provides that "[a] default in the CTS Market will be deemed to be a default in the Core Market and vice versa." Section 6.7.6 of the CTS Rate Schedule sets forth the default mitigation provisions to which participants are bound. It provides:

> If the CTS participant fails to pay any sum or to perform any other obligation to CTS or to CalPX when due, then CTS may, in its sole discretion and without further notice to the defaulting CTS Participant or regard to formalities of any kind . . . do any or all of the following in any order: . . . (e) sell or liquidate, as agent or attorney-in-fact for the defaulting CTS Participant, any Matches or cancel any bilateral deliveries it may then hold in the CTS Market. . . .

On January 5, 2001, the CalPX filed proposed Amendment 22 to its FERC tariff to permit PG&E and SCE to continue trading in the CalPX markets despite their deteriorating financial conditions. The proposed amendment would have relaxed the creditworthiness requirements included in the CTS Rate Schedule for certain CalPX market participants. It also would have authorized the CalPX governing board to waive collateral requirements. FERC ultimately rejected the proposed amendment, ruling that it represented an "inappropriate unilateral shifting of unacceptable financial risks" to wholesale energy suppliers, who had "negotiated over,

and agreed to do business with the . . . PX subject to, tariff provisions that included standard financial protections." *Cal. Indep. Sys. Operator Corp. et al.*, 94 FERC ¶ 61,132, 2001 WL 275661, at *8 (Feb. 14, 2001), *reh'g denied*, 95 FERC ¶ 61,026, 2001 WL 350274 (Apr. 6, 2001).

In mid-January, after SCE and PG&E defaulted on their obligations in the CalPX Core and CTS Markets, the CalPX invoked its authority under the CTS Rate Schedule's default mitigation provisions and commenced efforts to sell SCE and PG&E's contractual right to delivery of electricity through 2001 pursuant to their CTS block forward contract positions. Given that the prevailing price for electricity on the spot market vastly exceeded the price for electricity provided by SCE and PG&E's CTS block forward contracts – which had been negotiated the previous year – the value of SCE and PG&E's block forward positions, as of February 5, 2001, exceeded $200 million. The proceeds derived from the CalPX's sale of SCE and PG&E's contractual rights to electricity well below prevailing market rates were to be used to pay the IOUs' outstanding obligations to wholesale suppliers such as Duke.

C

On January 17, 2001, in response to electricity blackouts and the threatened insolvency of the State's IOUs, Governor Davis declared a state of emergency, finding that "the imminent threat of widespread and prolonged disruption of electrical power . . . constitutes a condition of extreme peril to the safety of persons and property within the state."

On January 19, after learning that the CalPX was about to liquidate its block forward contracts, SCE sought a temporary restraining order against the CalPX in California Superior Court. The court denied the TRO request, but held a hearing on January 24 to consider SCE's application for a preliminary injunction. *Id.* The State intervened in the proceeding and requested that a preliminary injunction be entered to provide Governor Davis time to decide whether to take action by invoking his emergency powers. *Id.* The court granted the State's request and entered a preliminary injunction against the CalPX to expire on February 2, 2001. On January 25, 2001, the State obtained a TRO, to expire on February 5, 2001, barring the CalPX's liquidation of PG&E's forward contracts, as well.

On February 2, as the preliminary injunction surrounding the SCE block forward contracts was about to expire, Governor Davis issued an Executive Order purporting to "commandeer" SCE's block forward contracts "to be held subject to the control and coordination of the State of California." The Executive Order was promulgated pursuant to section 8572 of the California Emergency Services Act, which provides that "[i]n the exercise of the emergency powers hereby vested in him during a . . . state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof." Cal. Gov't Code § 8572. On February 5, Governor Davis issued a similar Executive Order commandeering PG&E's block forward contracts. In press releases

publicizing the Executive Orders, Governor Davis explained that "I am using my emergency powers to seize options to buy very inexpensive power that would otherwise be lost forever. . . . By acting quickly and decisively, we have rescued these contracts from the auction block and preserved their low-cost value for consumers."

Duke filed the instant suit against Governor Davis and the CalPX on February 8, 2001. Duke sought injunctive relief against Governor Davis pursuant to *Ex parte Young*, 209 U.S. 123 (1908), alleging that Governor Davis's commandeering orders were preempted by federal law and hence violated the Supremacy Clause; Duke also alleged that the orders violated the Contracts Clause. In addition, Duke brought a breach of contract claim against the CalPX.

Governor Davis moved to dismiss on sovereign immunity grounds, and, in the alternative, moved for summary judgment on the merits. Duke filed a cross-motion for summary judgment. Prior to the hearing on the motions, Duke and the State came to an interim agreement whereby Duke agreed to provide electricity under the terms of the contracts directly to the California Department of Water Resources, and the State agreed to pay Duke the contract price for the electricity delivered. The CalPX, embroiled as it was in bankruptcy proceedings, failed to answer Duke's complaint or move for summary judgment.

On April 30, 2001, following a hearing on the summary judgment motions, the district court dismissed Duke's claims against Governor Davis on sovereign immunity grounds without further explanation. Duke

thereupon dismissed the CalPX from the action pursuant to Fed. R. Civ. P. 41(a)(1)(i) and filed this timely appeal.

Meanwhile, on March 15, 2001, the CalPX filed a claim with the California Victims Compensation and Government Claims Board for the liquidation value of the block forward market contracts commandeered by Governor Davis. This action is still pending.[3]

II

At the time that the district court dismissed this action against Governor Davis on sovereign immunity grounds, the CalPX still remained a defendant. Duke thereupon dismissed its claims against the CalPX without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(i),[4] which grants plaintiffs the absolute right to dismiss an action

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[3] Governor Davis's motions for judicial notice of the following documents are GRANTED: Statement of Claim filed March 15, 2001 with the California Victim Compensation and Government Claims Board by the CalPX; Letter dated May 31, 2001 to the State of California Board of Control from Susan D. Rossi, Managing Attorney of CalPX; Notice of Motion and Motion for Order Approving Debtor's Entry Into Stipulation Authorizing Official Committee of Participant Creditors to Prosecute and Defend Litigation in the Name of Debtor dated May 10, 2001, filed by CalPX in U.S. Bankruptcy Court for the Central District of California No. LA 01-16577-ES; Order of Bankruptcy Judge Erithe A. Smith filed June 28, 2001 granting such motion.

[4] Fed. R. Civ. P. 41(a)(1)(i) provides that "an action may be dismissed by the plaintiff without order of the court . . . by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . . "

without prejudice provided that the defendant has not yet filed an answer or a motion for summary judgment. On the same day that Duke dismissed the CalPX, Duke filed its notice of appeal challenging the district court's dismissal of Governor Davis on sovereign immunity grounds.

Governor Davis contends that we lack appellate jurisdiction over Duke's appeal under 28 U.S.C. § 1291. He argues that the district court's dismissal of Duke's claims against him was not a final judgment in light of the fact that Duke's claims against the CalPX still remained. Governor Davis further submits that Duke's subsequent dismissal of the CalPX without prejudice pursuant to Rule 41(a)(1)(i) constitutes an impermissible attempt by Duke to "manufacture" a final judgment in order to invoke our appellate jurisdiction.

Parties may appeal "final decisions of the district courts." 28 U.S.C. § 1291. A "final decision" for purposes of § 1291 is a "decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978).

Whether the district court's dismissal of Governor Davis constituted a final judgment for purposes of appellate jurisdiction under § 1291 depends upon the effect of Duke's dismissal of the CalPX pursuant to Rule 41(a)(1)(i). We have held that Rule 41(a)(1)(i) grants plaintiffs "an absolute right to dismiss [ ] without prejudice" claims against one or more defendant, and requires no action on the part of the court. *Pedrina v. Chun*, 987 F.2d 608, 610 (9th Cir. 1993). In *Pedrina*, we emphasized the

absolute nature of the plaintiff's right to dismiss under Rule 41(a)(1)(i):

> The [filing of a Rule 41(a)(1)(i) notice] itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone.

Id. (quoting *American Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963)). The effect of the filing of a notice of dismissal pursuant to Rule 41(a)(1)(i) "is to leave the parties as though no action had been brought." *Commercial Space Mgmt. Co. v. Boeing Co.*, 193 F.3d 1074, 1077 (9th Cir. 1999). Once the notice of dismissal has been filed, the district court loses jurisdiction over the dismissed claims and may not address the merits of such claims or issue further orders pertaining to them. *See id.* at 1077 n.4, 1079.

Duke's exercise of its absolute right to dismiss the CalPX pursuant to Rule 41(a)(1)(i) following the district court's dismissal of Governor Davis on sovereign immunity grounds left "nothing for the court to do but execute the judgment." Thus, the district court's judgment constituted a "final decision" for purposes of 28 U.S.C. § 1291. *See Coopers & Lybrand*, 437 U.S. at 467. To hold otherwise would be tantamount to construing § 1291 as implicitly limiting a plaintiff's absolute right to dismiss a defendant without prejudice – i.e., to "unjoin" a defendant – pursuant to Rule 41(a)(1)(i). None of the cases cited by Governor Davis supports such a proposition.

Governor Davis relies upon *Dannenberg v. The Software Toolworks Inc.*, 16 F.3d 1073 (9th Cir. 1994), as support for his argument that we lack appellate jurisdiction over this appeal. Governor Davis's reliance on *Dannenberg* is misplaced. In *Dannenberg*, we held that we did not have jurisdiction under § 1291 over an order granting partial summary judgment where the parties stipulated to the dismissal of the surviving claims without prejudice, subject to the plaintiff's right to reinstate them in the event of reversal on appeal. *Id.* at 1076-77. Observing that "[i]n essence, the claims [that had been dismissed without prejudice] remained in the district court pending a decision by this court," we concluded that "litigants should not be able to avoid the final judgment rule without fully relinquishing the ability to further litigate unresolved claims." *Id.* at 1077.

Dannenberg did not involve the effect of the complete dismissal of a defendant pursuant to Rule 41(a)(1)(i) for appellate jurisdiction purposes, and hence is distinguishable from the scenario presented here. The claims that survived partial summary judgment in *Dannenberg* "in essence . . . remained in the district court" pending a decision in our court; here, in contrast, the district court was immediately divested of jurisdiction over Duke's claims against the CalPX immediately upon Duke's filing of its Rule 41(a)(1)(i) notice of dismissal. *Commercial Space Mgmt. Co.*, 193 F.3d at 1077 n.4, 1079. Hence, there are no "unresolved" claims that "in essence . . . remain in the district court." *Dannenberg*, 16 F.3d at 1077.

In *State of Missouri ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999), the Eighth Circuit held that a Rule 41(a)(1)(i) dismissal of a remaining defendant does

not render a previous order finally dismissing another defendant "non-final" for purposes of appellate jurisdiction under 28 U.S.C. § 1291. The court explained:

> The Tribe relies primarily upon cases from other circuits holding that a voluntary dismissal of the claims pending against a defendant must be with prejudice to render final and appealable a previous order dismissing other claims *against the same defendant*. . . . These cases further the well-entrenched policy that bars a plaintiff from splitting its claims against a defendant. But this policy does not extend to requiring a plaintiff to join multiple defendants in a single lawsuit, so the policy is not violated when a plaintiff "unjoins" multiple defendants through a voluntary dismissal without prejudice.

164 F.3d at 1106. *See also* 8 Moore's Federal Practice ¶ 41.33[8][g][1] (3d ed. 1998) ("The plaintiff should [also] be permitted to expedite review of an involuntary dismissal of a defendant by dismissing the remaining defendants. Although an attempt to facilitate an appeal of an adverse order by voluntarily dismissing the remaining claims is generally prohibited unless the dismissal is with prejudice . . . the complete dismissal of a defendant from the lawsuit to expedite review should be permitted since the defendant will not be subject to the risk of multiple suits in different forums."). We agree with the Eighth Circuit and hold that we have jurisdiction over Duke's appeal.

III

Under the default mitigation provisions of the CalPX's CTS rate schedule, the right to liquidate the IOUs' block forward contract positions does not belong to wholesale electricity suppliers such as Duke, but rather to the CTS itself, "in its sole discretion." Based on this fact, Governor Davis contends that there is no "case or controversy" between himself and Duke, as required by Article III of the United States Constitution. Governor Davis's challenge to the Article III case or controversy requirement appears to be two-fold.

First, Governor Davis appears to suggest that Duke does not have standing to enjoin the commandeering orders because it has not suffered an injury-in-fact, an irreducible requirement for Article III standing, given that Duke did not have the legal right to liquidate the IOUs' forward contract positions in the first instance. While it is true that the *legal* right to liquidate the IOUs' forward positions belongs to the CalPX CTS division, the CTS would have no more than a de minimis *beneficial* interest in the proceeds derived from the liquidation. The value of the IOUs' forward contract positions constituted security for their past purchases through the CalPX markets from wholesale suppliers of electricity such as Duke. It is thus beyond dispute that Duke, owed millions of dollars by the defaulting IOUs for past electricity purchases in both the CalPX core and CTS markets, would be one of the beneficiaries of the CTS's liquidation of the IOUs' forward contract positions. As a beneficial interestholder in the liquidation value of the IOUs' forward contracts, Duke suffered an injury-in-fact from Governor Davis's commandeering orders and has standing to bring

this action.[5] *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 434 (1998) (holding that beneficiaries have standing to sue, citing "self-evident proposition that more than one party may have standing to challenge a particular action or inaction"); *Tyler v. Cuomo*, 236 F.3d 1124, 1135 (9th Cir. 2000) (third-party beneficiaries have Article III standing to sue).

Second, Governor Davis also appears to suggest that Duke does not have standing to pursue this action given that, under the CTS rate schedule, the decision whether to liquidate the IOUs' forward contract positions is left to the CTS itself "in its sole discretion." The fact that liquidation of the forward contracts is discretionary on the part of a third-party to this appeal raises a potential redressability issue. The standing requirement of Article III is not met where it is "purely speculative" whether the plaintiff's injury "fairly can be traced to the challenged action of the defendant," or instead "result[ed] from the

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[5] Governor Davis asserts that Duke "should not be given the opportunity to gain an advantage over the other suppliers who also may share an interest in the liquidation value of the BFM contract being pursued by the CalPX" in its takings claim before the California Victims Compensation and Government Claims Board on behalf of all electricity wholesale sellers injured by Governor Davis's commandeering orders. The pendency of the CalPX's takings claim in the state proceeding, however, has no bearing on the question of whether Duke has met the case or controversy requirement of Article III. Nor is it clear how Duke might obtain an unfair advantage over other suppliers by pursuing this action: Should Duke succeed, the commandeering orders would be enjoined, allowing for the liquidation of the forward contracts. It would then be up to the CalPX to decide how best to distribute proceeds from the liquidation sale.

independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

Although liquidation of the IOUs' forward contract positions is discretionary on the part of the CalPX, there is nothing at all "speculative" about tracing Duke's injury to Governor Davis's commandeering orders rather than to some independent decision against liquidation made by the CalPX. Indeed, the CalPX was in the process of liquidating the IOUs' forward contract positions when the State successfully intervened in the California Superior Court actions in support of the IOUs' request for injunctive relief against the CalPX. Governor Davis issued his commandeering orders just as the Superior Court injunctions against the liquidation by CalPX were about to expire. The chronology of events leading up to the issuance of Governor Davis's commandeering orders forecloses any doubt that Duke's injury stems from the commandeering orders alone.

Thus, the Article III "case or controversy" requirement is met here.

IV

We next address whether Duke's action against Governor Davis is barred by state sovereign immunity, as the district court concluded.

A

Under *Ex parte Young*, 209 U.S. 123 (1908) and its progeny, a suit challenging the legality under federal law

of a state official's action in enforcing state law is not a suit against the State, and hence is not subject to state sovereign immunity. *Id.* at 159-160. Since the State cannot authorize its officers to violate federal law, such officers are "stripped of [their] official or representative character and are subjected in [their] person to the consequences of [their] individual conduct." *Id. Ex parte Young* relief is limited to actions seeking *prospective* relief against state officials in their official capacity; actions for retroactive relief against state officers sued in their official capacity are regarded as actions against the State itself for Eleventh Amendment purposes. *Edelman v. Jordan*, 415 U.S. 651 (1974).

Governor Davis contends that Duke is requesting impermissible retroactive relief in this action. According to Governor Davis, "Duke's claims seek relief for losses arising out of transactions with the defaulting utilities which occurred *prior* to Governor Davis's commandeering of the BFM contracts." Governor Davis further argues that his issuance of the commandeering orders is in essence a *fait accompli*, which could at most be construed as a *past* violation of federal law.

First, the fact that Duke's goal in seeking to enjoin Governor Davis's commandeering orders is to improve its chances of recovering the past-due obligations from the *IOUs* has no state sovereign immunity significance. State sovereign immunity bars actions for damages against the *State* for past violations of federal law. *Natural Res. Def. Council v. Cal. Dept. of Transp.*, 96 F.3d 420, 422 (9th Cir. 1996) (federal court may not award retroactive relief that requires payment of funds from state treasury). Duke's attempt to collect the IOUs' defaulted obligations

in no way represents an effort to invade the State's fisc nor to obtain any other retroactive remedy against the State.

Second, Governor Davis's characterization of the issuance of his commandeering orders as a *fait accompli* is similarly insufficient to immunize him from *Ex parte Young* liability. Because the contracts that Governor Davis commandeered require delivery of electricity through December 31, 2001, Governor Davis's commandeering orders have an on-going effect that can be enjoined without rendering the relief "retrospective" in nature, consistent with *Ex parte Young*. Should Duke prevail on the merits, the CalPX would be free to liquidate the IOUs' remaining positions in the block forward market contracts.

B

Governor Davis further contends that Duke's action falls within an exception to *Ex parte Young* carved out by *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). In *Coeur d'Alene*, the Supreme Court held that the Coeur d'Alene Tribe could not invoke the *Ex parte Young* exception to state sovereign immunity in an action seeking to divest the State of all regulatory authority over certain submerged lands located within Idaho. A majority of the Court explained that "this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action [against a State] which implicates special sovereignty interests." *Id.* at 281. In rejecting the Tribe's *Young* action, the Court emphasized the "far-reaching and invasive relief" sought by the Tribe:

> The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

Id. at 282.

Governor Davis contends that Duke's action similarly implicates the State's "special sovereignty interests," asserting that "there is very little that could be more sovereign than taking private property for the public benefit and safety during times of emergency."[6] However, Governor Davis neglects the factual uniqueness of *Coeur d'Alene* that the Court found justified a narrow

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[6] It is helpful to recount the facts of *Ex parte Young* here. In *Young*, shareholders of various railroads sought to enjoin the Minnesota Attorney General from enforcing state statutes duly enacted by the Minnesota Legislature that allegedly deprived them of due process and equal protection. 209 U.S. at 130. The statutes reduced the rates the railroad companies could charge for transporting passengers and cargo. *Id.* at 127. Significantly, in *Young*, the Court held that the shareholders *could* bring their suit in federal court for prospective injunctive relief against the state officer acting in his official capacity, despite the fact that there is "little that could be more sovereign" than a state enacting a law for its citizens' general welfare and its subsequent enforcement by the state attorney general.

limitation on the *Ex parte Young* doctrine. In *Coeur d'Alene*, the Tribe sought declaratory and injunctive relief based on a claim of ownership of certain submerged lands, including a declaration of entitlement to exclusive use and occupancy, a declaration of the invalidity of all state regulation of the lands, and an injunction against any violation of the Tribe's rights in the land. 521 U.S. at 265. Had the Tribe received the relief it requested, the State would have permanently lost control over acres of territory long deemed to be part of its sovereign borders.

A recent case from this Court, *Agua Caliente Band of Cahuila Indians v. Hardin*, 223 F.3d 1041 (9th Cir. 2000), explained the narrowness of the holding in *Coeur d'Alene*:

> In *Coeur d'Alene*, it was the unique divestiture of the state's broad range of controls over its own lands that made the *Young* exception to sovereign immunity inapplicable. Thus, in the case on appeal here, characterizing the state's interest in taxation as a core sovereignty area does not address the question posed by *Coeur d'Alene*. Indeed, *the question posed by Coeur d'Alene is not whether a suit implicates a core area of sovereignty, but rather whether the relief requested would be so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself.*

Id. at 1048 (emphasis added). One cannot disagree with Governor Davis' characterization of the exercise of his emergency powers to take private property for the public's benefit and safety as a core state sovereignty area –

undoubtedly it is.[7] Rather, the proper question is whether granting Duke the relief it seeks would "be so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself." *Id.*

If Duke were requesting relief that would permanently divest the Governor of his future ability to invoke his emergency powers or remove an entire area over which he could previously use his powers, such as California's intrastate electricity supply, then the narrow holding of *Coeur d'Alene* might well apply. Instead, Duke seeks an injunction against a specific executive order in an area preempted by federal law, which falls squarely under *Ex parte Young*. Granting Duke the relief it requests will not deprive Governor Davis of his regulatory authority and police power to deal with the electricity crisis; such an attempt would be much closer to the facts in *Coeur d'Alene*.

In *Coeur d'Alene* itself, Justice O'Connor recognized the difference between enjoining a specific state activity and depriving a state of all regulatory authority:

> [T]he Tribe does not merely seek to possess land that would otherwise remain subject to state regulation, or to bring the State's regulatory scheme into compliance with federal law.

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[7] We do not question the importance of California's interest in having a reliable and affordable supply of electricity; however, the importance of this interest does not bar the application of the *Young* doctrine. *See Coeur d'Alene*, 521 U.S. at 296 ("[W]e have never doubted the importance of state interests in cases falling squarely within our past interpretations of the *Young* doctrine.") (O'Connor, J., concurring in part and in the judgement).

> Rather, the Tribe *seeks to eliminate altogether the State's regulatory power over the submerged lands at issue* – to establish not only that the State has no right to possess the property, but also that the *property is not within Idaho's sovereign jurisdiction at all.*

Id. at 289 (emphasis added). While the "difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night," *Edelman v. Jordan*, 415 U.S. 651, 667 (1974), the case before us falls on the *Ex parte Young* side of the line, and we need not determine how much divestiture of a state's sovereignty is enough to trigger *Coeur d'Alene*.[8]

This Court has most recently expressly rejected Governor's Davis's broad reading of *Coeur d'Alene* in *Goldberg v. Ellett (In re Ellett)*, 2001 U.S. App. LEXIS 15898 (9th Cir. July 16, 2001). In *Goldberg*, we held that *Coeur d'Alene* did not bar an *Ex parte Young* action to enjoin the Director of the California Franchise Tax Board from attempting to collect a bankrupt's tax debts discharged in bankruptcy. While recognizing the "profound nature" of the State's sovereign interest in the administration of its tax system, we held that "the narrow exception to *Ex parte Young*

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[8] The extent to which *Coeur d'Alene* is limited to its "particular and special circumstances," 521 U.S. at 287, cannot be overstated. The Court states that "navigable waters uniquely implicate sovereign interests," *id.* at 284, submerged lands have a "unique status in the law and [are] infused with a public trust the State itself is bound to respect," *id.* at 283, "these lands are tied in a unique way to sovereignty," *id.* at 286, and even includes a citation to the Magna Carta to show the relation between navigable waters and sovereign interests. *Id.* at 284.

carved out by *Coeur d'Alene* requires an assessment of the intrusion on state sovereignty of the *specific relief* requested by the plaintiff, not whether the relief merely *relates to* a more general area of core state sovereign interest." 2001 U.S. App. LEXIS 15898, at *23 (emphasis added). We concluded that the bankrupt's action was not barred under *Coeur d'Alene* because he "simply seeks prohibitory relief preventing [the Director of the FTB] from violating the bankruptcy court's discharge injunction by attempting to collect from [him] specific prepetition income tax obligations duly discharged in bankruptcy under federal law," which we contrasted with the sweeping and intrusive relief at issue in *Coeur d'Alene*. *Id.*

Thus, under *Agua Caliente* and *Goldberg*, the fact that Duke's lawsuit implicates the State's sovereignty interest in the gubernatorial exercise of emergency powers does not suffice to trigger the *Coeur d'Alene* exception to *Ex parte Young*.[9] Rather, Duke "merely seeks prohibitory

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[9] No one can doubt that Governor Davis could not commandeer the federally owned electricity generators on the Naval Base in San Diego to serve distressed customers nearby. Such a bold action, no matter how necessary to the health and welfare of California's citizens, would certainly be preempted by the Constitution, which gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3. *See Kleppe v. New Mexico*, 426 U.S. 529 (1976) (enjoining New Mexico from removing wild horses and burros from federal land); *U.S. v. California*, 332 U.S. 19 (1947) (granting the United States an injunction against California to stop it from leasing federal offshore property to private corporations who were extracting petroleum, gas, and other mineral deposits). The invocation of his police power would not trump standard federal preemption principles and

relief" preventing Governor Davis from exercising his emergency powers in direct conflict with federal law in an area within the exclusive jurisdiction of FERC. *See Goldberg*, 2001 U.S. App. LEXIS 15898, at *23. The relief Duke seeks cannot remotely be analogized to the sweeping relief requested by the Tribe in *Coeur d'Alene* in an area that uniquely implicated state sovereignty concerns. Accordingly, the *Coeur d'Alene* exception to *Ex parte Young* is inapplicable here.

C

Finally, Governor Davis contends that Congress intended to preclude *Ex parte Young* actions against state officials under the Federal Power Act. *See Seminole Tribe v. Florida*, 517 U.S. 44, 74-75 (1996) (holding that Congress intended to preclude *Ex parte Young* actions under the Indian Gaming Regulatory Act because the Act provided much more limited relief against state officials than relief available under *Ex parte Young*).

Duke correctly observes that the *Seminole Tribe* exception to *Ex parte Young*, which Governor Davis invokes, pertains only to *Ex parte Young* actions brought to enjoin state officials from on-going violations of federal *statutory*, rather than *constitutional*, law. *Id.* at 74; *Ellis v. Univ.*

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this Court's ability to enforce them. So, too, may this Court enforce preemption principles embodied in the Supremacy Clause despite a State's interest in its sovereignty. This Court would no more trammel on state sovereignty interests by enjoining the Governor's commandeering of these block forward contracts than by enjoining the Governor's commandeering of the Navy's power plants.

of Kan. Med. Ctr., 163 F.3d 1186, 1197 (10th Cir. 1999). Duke's preemption claim against Governor Davis is not predicated on the Federal Power Act, but rather on the Supremacy Clause of the United States Constitution. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986) (characterizing preemption of state regulatory actions inconsistent with FERC rulings as "a matter of enforcing the Supremacy Clause"). Thus, the *Seminole Tribe* exception to *Ex parte Young* is also inapplicable.[10]

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[10] Even if Duke's preemption claim could be characterized as predicated on the FPA, section 201(f) of the FPA does not remotely evidence a Congressional intent to preclude *Ex parte Young* actions against state officials. Section 201(f) provides:

> No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

16 U.S.C. § 824(f). Section 201(f) simply means that state-owned agencies may not be regulated as "public utilities" subject to FERC's jurisdiction. *Transmission Access Policy Study Group v. F.E.R.C.*, 225 F.3d 667, 697 (D.C. Cir. 2000). Thus, state and municipal agencies are not subject to the obligations of the FPA, *see Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 n.16 (1985), and FERC lacks authority to set their rates, *Kootenai Elec. Co-op., Inc. v. F.E.R.C.*, 192 F.3d 144, 148 (D.C. Cir. 1999). Manifestly, section 201(f) does *not* immunize state officials from federal suit where they purport to regulate in areas subject to FERC's exclusive jurisdiction.

V

The parties agree that the relevant facts are not in dispute and they each invite us to address the merits of Duke's action. Given that further delay would be highly prejudicial to Duke, as it seeks only prospective relief relating to contracts that expire by December 31, 2001, we accept the parties' invitation.

A

The FPA applies to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b), (d). FERC's exclusive jurisdiction extends over all facilities for such transmission or sale of electric energy. *See id.* As a result, FERC has jurisdiction over any "public utility," which the FPA defines as any person who owns or operates facilities subject to FERC's jurisdiction. 16 U.S.C. § 824(e). *See generally Automated Power Exch., Inc. v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000). Retail sales of electricity and wholesale intrastate sales are within the exclusive jurisdiction of the States and are not implicated here. *In re Cal. Power Exch.*, 245 F.3d at 1114. The CalPX is a "public utility" subject to FERC's exclusive jurisdiction. *Automated Power Exch.*, 204 F.3d at 1147 & n.2. As a result, the CalPX operated pursuant to FERC-approved rate schedules and tariffs. *In re Cal. Power Exch.*, 245 F.3d at 1114.

The Supreme Court has observed that, in the FPA, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction. . . . This was done in the Power Act by making [FERC] jurisdiction plenary

and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (quoting *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964)). The Court has explored the line separating state and federal jurisdiction under the FPA in a number of cases involving the "filed rate doctrine," which in essence provides that "interstate power rates filed with FERC or fixed by FERC must be given binding effect" by state authorities regulating in areas subject to state jurisdiction, e.g., retail rates; hence, FERC-approved rates preempt conflicting regulations adopted by the States. *Id.* at 962. The Court has, moreover, observed that "the filed rate doctrine is not limited to 'rates' *per se*" or FERC orders that "deal in terms of prices or volumes of purchases." *Id.* at 966 (holding that, under filed rate doctrine, a FERC-approved allocation of power preempted the North Carolina Utilities Commission's subsequent reallocation of power incident to its retail rate-setting authority).

B

Governor Davis's commandeering orders directly nullify the security and default mitigation provisions of the FERC-approved CTS rate schedule, and hence cross the "bright line" between state and federal jurisdiction established by the FPA. By preventing the CalPX from liquidating the IOUs' block forward positions to cover their defaults in the CalPX markets, Governor Davis's commandeering orders effectively rewrote the terms of the CTS rate schedule, depriving wholesale suppliers

such as Duke of their bargained-for collateral and default mitigation rights. Of course, because the block forward contracts were within FERC's authority, Governor Davis could not simply have decreed that the IOUs' debts to their wholesale suppliers be forgiven. And yet his commandeering orders, which in both purpose and effect frustrated the wholesale suppliers' ability to receive at least partial payment for the IOUs' past purchases of electricity, were the functional equivalent of such an obviously impermissible decree.

FERC's rejection of the CalPX's proposed Amendment 22 to its FERC tariff is instructive. Amendment 22, which CalPX filed with FERC on January 5, 2001, would have lowered the short-term credit ratings required for CalPX market participants to obtain unsecured credit; the Amendment's purpose was to permit PG&E and SCE to continue trading in the CalPX markets. Most significantly, the proposed Amendment also would have granted new authority to the CalPX's governing board to waive the CalPX tariff's collateral requirements. FERC rejected the proposed Amendment, stating:

> The ISO [Independent System Operator] and PX tariffs, in their original forms, were designed to incorporate creditworthiness protections that were consistent with applicable provisions of commercial law. . . . [T]hird-party suppliers negotiated over, and agreed to do business with the ISO and PX subject to, tariff provisions that included standard financial protections. We find that by simply lowering the standards for the two largest buyers in these markets, the proposed amendments entail an inappropriate unilateral shifting of unacceptable financial risks to

> both large and small third-party suppliers. Moreover, we are concerned that a lowering of the financial creditworthiness standard, without some assurance of payment for third party sales, would further increase prices paid by consumers. This is because . . . the tariff revisions likely would increase the risk premium added to the price of power due to the exposure of non-payment.

94 FERC ¶ 61,132, 2001 WL 275661, at *8. The Governor's commandeering orders deprived wholesale suppliers of the very "standard financial protections" that the CalPX itself *unsuccessfully* petitioned FERC to eliminate from its tariff.

This case is distinguishable from the cases exploring the filed rate doctrine in one respect, however: By commandeering the wholesale suppliers' collateral, Governor Davis was acting *solely* in an area reserved for exclusive federal jurisdiction. Unlike the typical filed rate doctrine case, Governor Davis's orders were not even issued incident to an area of state regulatory authority. Thus, there can be little doubt that Governor Davis's orders constituted an impermissible intrusion into FERC's territory. As Justice Scalia has observed, "[i]t is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring).

The situation presented here is thus precisely the *reverse* of the situation presented in *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), a case on which Governor Davis places a great deal of unwarranted

reliance. In *Northern States,* FERC promulgated a tariff order that required a public utility to curtail electrical transmission to interstate wholesale customers on a comparable basis with its intrastate/retail consumers when it experiences power constraints. *Id.* at 1093. The court ruled that FERC's tariff order represented an attempt to regulate retail practices reserved exclusively to the States and therefore exceeded FERC's jurisdiction. *Id.* at 1096. *Northern States* has no relevance to Duke's preemption claim. The default mitigation and security provisions of the CTS rate schedule, with which Governor Davis's commandeering orders directly conflict, fall well within FERC's exclusive jurisdiction over interstate wholesale electricity sales. Governor Davis has encroached upon FERC's exclusive authority, not vice versa.

Governor Davis contends that his commandeering orders are not preempted because they "did not change the allocation of power to be delivered in California pursuant to the BFM contracts or alter Duke's obligations to provide the energy beyond the duration it previously agreed to with SCE and PG&E." This argument simply side-steps the issue at stake here: the conflict between Governor Davis's orders and the CTS rate schedule's security and default mitigation provisions. Without explanation, Governor Davis contends that "the proper focus is not whether there is a conflict with the tariffs, but whether there was a conflict between the state and federal schemes." The filed rate doctrine belies this assertion. Even so, FERC's rejection of the CalPX's proposed Amendment 22 amply demonstrates the conflict "between the state and federal schemes." The federal scheme established by FERC for transactions through the

CalPX required "standard financial protections" and "assurance of payment for third party sales." 94 FERC ¶ 61,132, 2001 WL 275661, at *8. The "state scheme" evidenced by Governor Davis's commandeering orders deprived wholesale suppliers of their FERC-required collateral for past transactions, and hence of their "assurance of payment."

Thus, it is not enough that California agrees to pay the same rate to Duke or requires Duke to continue to supply electricity for a duration no longer than the block forward contracts provide. Indeed, in that respect, California is a complete substitute for SCE and PG&E. However, by commandeering the block forward contracts, Duke (and, derivatively, the CalPX) lost its FERC-protected right to standard financial protection, i.e., to liquidate its collateral if the buyers default on their obligations. It is Governor Davis's interference with the block forward contracts' security provisions that is preempted by the federal scheme.[11] FERC preempts

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[11] At oral argument there was a discussion of whether Governor Davis could commandeer an airline-owned passenger jet parked at San Francisco International Airport, given that airlines and aircraft are highly regulated by the Federal Aviation Administration ("FAA"). The analogy is not apt, however, because the State of California could commandeer the aircraft and yet still abide by FAA regulations, such as the amount of continuous hours pilots can spend flying. Thus, federal regulations would not preempt Governor Davis's exercise of his police power in seizing the aircraft; rather, any use by the State that conflicted with federal regulations would be preempted. Here, it is the very act of commandeering the block forward contracts that is preempted because in so doing, the Governor nullified express requirements of a FERC-regulated and

regulation of the contracts' economics of administration, which, by destroying Duke's ability to exercise its rights to assure payment for third-party sales, is exactly why Governor Davis's executive order cannot stand. Hence, Governor Davis's commandeering orders to the extent that they conflict with FERC requirements are void under the Supremacy Clause of the United States Constitution.[12]

VI

For the foregoing reasons, the judgment of the district court is REVERSED. We remand to the district court with instructions that judgment be entered in favor of Duke Energy and that an appropriately tailored injunction against Governor Davis's commandeering orders be entered forthwith.

REVERSED AND REMANDED.

COUNSEL LISTING

Geoffrey Bestor (argued), Barry R. Ostrager, Seth A. Ribner, Steven H. Bergman, Simpson Thacher & Bartlett, Universal City, California; Joel B. Kleinman, Larry F. Eisenstat, Geoffrey Bestor, Mark L. Perlis, Dickstein Shapiro Morin & Oshinsky LLP, for Appellant.

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approved scheme. If Governor Davis could commandeer the contracts without disrupting the structure created by FERC, then we would have a situation closer to the aircraft hypothetical.

[12] Because Duke is entitled to relief against Governor Davis on its claim under the Supremacy Clause, we need not reach its Contracts Clause claim.

Danette E. Valdez (argued), Deputy Attorney General, Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistan[t] Attorney General, Morris Beatus, Senior Assistant Attorney General, Andrea Lynn Hoch, Supervising Deputy Attorney General, San Francisco, California, for Appellee.

Duke Energy v. *Davis*, No. 01-55770 – Filed September 20, 2001

KOZINSKI, Circuit Judge, dissenting:

Whether plaintiff may maintain this action against the Governor of California under *Ex parte Young*, 209 U.S. 123 (1908), is surely a close and difficult question. Judge O'Scannlain has written a fine opinion and I am almost persuaded – but not quite. I read *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), as creating an exception to *Ex parte Young* where the suit implicates the state's fundamental sovereign interests. 521 U.S. at 282-84, 287-88. Here, Governor Davis exercised the state's power of eminent domain in response to what was concededly a major emergency affecting the health, safety, welfare and comfort of the people of California. This emergency affected not merely the price of electrical power, but its very availability. For the first time in its history, the state was confronted with rolling blackouts which themselves caused serious disruptions; there was good reason to believe that far worse was in store.

Under authority vested in him by the state legislature, the Governor acted decisively to restore order in the

electricity market and thus to avert further disruptions. Plaintiff here challenges one aspect of the Governor's response; it asks the court to second-guess the actions of the Governor, taken for the purpose of averting what he reasonably believed to be an impending power catastrophe. A more pointed interference with the state's essential sovereign interests by the federal courts is hard to imagine. If *Coeur d'Alene* does not cover this situation, then it must apply only where Indian tribes challenge the state's title to submerged lands and nowhere else. Unlike the majority, I cannot read *Coeur d'Alene* quite so narrowly. Whether one follows the balancing approach of Justice Kennedy's principal opinion, or the categorical approach of Justice O'Connor's concurrence, "it simply cannot be said that the suit [here] is not a suit against the State." 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment).

Because it is important not to let the case become moot by the passage of time, I will not belabor the point. I believe the lines are clearly drawn by Judge O'Scannlain's excellent opinion and my, hopefully, adequate dissent.

APPENDIX B

United States District Court
Central District of California
Western Division

DUKE ENERGY TRADING AND MARKETING, L.L.C., Plaintiff, v. GRAY DAVIS, *et al.*, Defendants.	CV 01-01252 TJH (BQRx) **Order** (Filed April 30, 2001)

The Court has considered Defendant Gray Davis's motion to dismiss or, in the alternative, for summary judgment, Plaintiff's motion for partial summary judgment against Defendant Gray Davis, and Plaintiff's motion to certify its partial summary judgment as final, together with the moving and opposing papers.

It is Ordered that Defendant Gray Davis's motion to dismiss be, and hereby is, **Granted**.

It is further Ordered that Plaintiff's motion for partial summary judgment be, and hereby is, **Denied**.

It is further Ordered that Plaintiff's motion to certify its partial summary judgment as final be, and hereby is, **Denied** as moot.

Date: April 30, 2001

/s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
Chief United States District Judge

APPENDIX C

United States District Court
Central District of California
Western Division

DUKE ENERGY TRADING AND MARKETING, L.L.C., Plaintiff, v. GRAY DAVIS, *et al.*, Defendants.	CV 01-01252 TJH (BQRx) **Judgment** (Filed Jan. 7, 2002)

In accordance with the mandate of the United States Court of Appeals for the Ninth Circuit,

It is Ordered, Adjudged and Decreed that judgment be, and hereby is, **Entered** in favor of Plaintiff and against Defendant Gray Davis.

It is further Ordered, Adjudged and Decreed that Defendant Gray Davis be, and hereby is, **Enjoined** from taking action against Plaintiff concerning any outstanding block-forward contracts under the authority of Executive Orders D-20-01 and D-21-01 issued February 2, 2001, and February 5, 2001, respectively, and dated January 31, 2001.

It is further Ordered, Adjudged and Decreed that each party shall bear its own costs.

Date: January 7, 2002

/s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
United States District Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DUKE ENERGY TRADING AND MARKETING, L.L.C., Plaintiff-Appellant, v. GRAY DAVIS, Governor of the State of California, Defendant-Appellee, and CALIFORNIA POWER EXCHANGE CORPORATION, Defendant.	No. 01-55770 D.C. No. CV-01-01252-TJH ORDER (Filed Dec. 6, 2001)

Before: WOOD*, KOZINSKI, and O'SCANNLAIN, Circuit Judges.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge has requested a vote on

* The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

whether to rehear the matter en banc. *See* Fed. R. App. P. 35. Accordingly, the Petition for Rehearing En Banc is also DENIED.

The mandate shall issue FORTHWITH. Fed. R. App. P. 41(b).

APPENDIX E

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Eleventh Amendment to the United States Constitution:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Federal Power Act, Title 16, United States Code

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

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§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order within further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is

located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new

findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860, and amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. l. 85-791, § 16, 72 Stat. 947.)

California Emergency Services Act, California Government Code, §§ 8550, et seq.

§ 8550. Findings and declarations

The state has long recognized its responsibility to mitigate the effects of natural, manmade, or war-caused

emergencies which result in conditions of disaster or in extreme peril to life, property, and the resources of the state, and generally to protect the health and safety and preserve the lives and property of the people of the state. To insure that preparations within the state will be adequate to deal with such emergencies, it is hereby found and declared to be necessary:

(a) To confer upon the Governor and upon the chief executives and governing bodies of political subdivisions of this state the emergency powers provided herein; and to provide for state assistance in the organization and maintenance of the emergency programs of such political subdivisions;

(b) To provide for a state agency to be known and referred to as the Office of Emergency Services, within the Governor's office; and to prescribe the powers and duties of the director of that office;

(c) To provide for the assignment of functions to state agencies to be performed during an emergency and for the coordination and direction of the emergency actions of such agencies;

(d) To provide for the rendering of mutual aid by the state government and all its departments and agencies and by the political subdivisions of this state in carrying out the purposes of this chapter;

(e) To authorize the establishment of such organizations and the taking of such actions as are necessary and proper to carry out the provisions of this chapter.

It is further declared to be the purpose of this chapter and the policy of this state that all emergency services functions of this state be coordinated as far as possible with the comparable functions of its political subdivisions, of the federal government including its various departments and agencies, of other states, and of private agencies of every type, to the end that the most effective use may be made of all manpower, resources, and facilities for dealing with any emergency that may occur.

(Added by Stats. 1970, c. 1454, p. 2845, § 2.)

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§ 8572. Commandeering private property or personnel

In the exercise of the emergency powers hereby vested in him during a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof.

Notwithstanding the provisions of this section, the Governor is not authorized to commandeer any newspaper, newspaper wire service, or radio or television station, but may, during a state of war emergency or state of emergency, and if no other means of communication are available, utilize any news wire services, and the state shall pay the reasonable value of such use. In so utilizing

any such facilities, the Governor shall interfere as little as possible with their use for the transmission of news.

(Added by Stats. 1970, c. 1454, p. 2849, § 2.)

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§ 8652. Claims for taking or damaging private property.

Before payment may be made by the state to any person in reimbursement for taking or damaging private property necessarily utilized by the Governor in carrying out his responsibilities under this chapter during a state of war emergency or state of emergency, or for services rendered at the instance of the Governor under said conditions, such person must present a claim to the State Board of Control in accordance with the provisions of the Government Code governing the presentation of claims against the state for the taking or damaging of private property for public use, which provisions shall govern the presentment, allowance, or rejection of such claims and the conditions upon which suit may be brought against the state. Payment for such property or services shall be made from any funds appropriated by the state for such purpose.

(Added by Stats. 1970, c. 1454, p. 2864, § 2.)

APPENDIX F

EXECUTIVE DEPARTMENT

STATE OF CALIFORNIA

[SEAL]

PROCLAMATION
by the
Governor of the State of California

WHEREAS, shortages of electricity available to California's utilities have today resulted in blackouts affecting millions of Californians; and

WHEREAS, unanticipated and dramatic increases in the price of electricity have threatened the solvency of California's major public utilities, preventing them from continuing to acquire and provide electricity sufficient to meet California's energy needs; and

WHEREAS, the California Public Utilities Commission, the Independent Systems Operator and the Electricity Oversight Board have advised that the electricity presently available from California's utilities is insufficient to prevent widespread and prolonged disruption of electric service within California; and

WHEREAS, this energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission; and

WHEREAS, the imminent threat of widespread and prolonged disruption of electrical power to California's emergency services, law enforcement, schools, hospitals, homes, businesses and agriculture constitutes a condition of extreme peril to the safety of persons and property

within the state which, by reason of its magnitude, is likely to be beyond the control of the services, personnel, equipment, and facilities of any single county or city; and

WHEREAS, under the provisions of Section 8558 (b) of the California Government Code, I find that an emergency exists;

NOW, THEREFORE, I, GRAY DAVIS, Governor of the State of California, in accordance with the authority vested in me by the California Emergency Services Act, and in particular, Section 8625 of the California Government Code, HEREBY PROCLAIM A STATE OF EMERGENCY to exist within the State of California; and

IT IS ORDERED that all agencies of the state government utilize and employ state personnel, equipment and facilities for the performance of any and all activities to alleviate this emergency.

IT IS FURTHER ORDERED that the Department of Water Resources, separate and apart from its powers and responsibilities with respect to the State Water Resources Development System, shall enter into contracts and arrangements for the purchase and sale of electric power with public and private entities and individuals as may be necessary to assist in mitigating the effects of this emergency. The Department is hereby directed to enter into these contracts as expeditiously as possible and is hereby authorized to do so notwithstanding the provisions of the Government Code and the Public Contract Code applicable to state contracts, including but not limited to, advertising and competitive bidding requirements, which provisions are suspended pursuant to Government Code section 8571 to the extent that they

would prevent, hinder or delay the prompt mitigation of the effects of this emergency. The department is further directed to maintain as separate and distinct the obligations incurred and the funding of such contracts and arrangements from the funds, monies and obligations of the State Water Resources Development System.

I FURTHER DIRECT that as soon as hereafter possible, this proclamation be filed in the Office of the Secretary of State and that widespread publicity and notice be given to this proclamation.

[SEAL] **IN WITNESS WHEREOF** I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this the seventeenth day of January 2001.

/s/ Gray Davis

Governor of California

APPENDIX G

EXECUTIVE DEPARTMENT

STATE OF CALIFORNIA

[SEAL]

EXECUTIVE ORDER D-20-01
by the
Governor of the State of California

WHEREAS, on January 17, 2001, I proclaimed a State of Emergency to exist within the State of California due to the existing energy shortage in the State of California; and

WHEREAS, California's energy shortage has resulted in unanticipated power outages for California residents and for critical services in the State, including but not limited to, schools, transportation facilities, businesses, and agriculture; and

WHEREAS, these power outages threaten the health and safety of California residents, critical services in the State, and vital segments of California's economy; and

WHEREAS, it is necessary for the State to take control of the block forward market contracts to ensure a sufficient and continuous supply of electricity to meet California's energy needs and to mitigate the effects of this energy shortage; and

WHEREAS, the circumstances require extraordinary measures beyond the authority vested in the California Public Utilities Commission;

NOW, THEREFORE, I GRAY DAVIS, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and the statutes of the State of California, including the California Emergency Services Act, and in furtherance of my Proclamation of a State of Emergency, do hereby issue this order to become effective immediately:

Pursuant to section 8572 of the California Emergency Services Act, is ordered that the contracts and trades in the market for the sales and purchases of forward contracts and trades for electricity (known as the "Block Forward" market) for the delivery of electricity possessed by Southern California Edison Company, a corporation organized and existing under the laws of the State of California with its principal place of business in California, and subject to actions, including liquidation, by the California Power Exchange Corporation, a non-profit public benefit corporation organized and existing under the laws of the State of California, is hereby commandeered by the State of California to be held subject to the control and coordination of the State of California.

I FURTHER DIRECT that as soon as hereafter possible, this order be filed in the Office of the Secretary of State and that widespread publicity and notice be given to this order.

[SEAL] **IN WITNESS WHEREOF** I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this the thirty-first day of January 2001.

/s/ Gray Davis

Governor of California

EXECUTIVE DEPARTMENT

STATE OF CALIFORNIA

[SEAL]

EXECUTIVE ORDER D-21-01
by the
Governor of the State of California

WHEREAS, on January 17, 2001, I proclaimed a State of Emergency to exist within the State of California due to the existing energy shortage in the State of California; and

WHEREAS, California's energy shortage has resulted in unanticipated power outages for California residents and for critical services in the State, including but not limited to, schools, transportation facilities, businesses, and agriculture; and

WHEREAS, these power outages threaten the health and safety of California residents, critical services in the State, and vital segments of California's economy; and

WHEREAS, it is necessary for the State to take control of the block forward market contracts to ensure a sufficient and continuous supply of electricity to meet California's energy needs and to mitigate the effects of this energy shortage; and

WHEREAS, the circumstances require extraordinary measures beyond the authority vested in the California Public Utilities Commission;

NOW, THEREFORE, I, GRAY DAVIS, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and the statutes of the State of California, including the California Emergency Services Act, and in furtherance of my Proclamation of a State of Emergency, do hereby issue this order to become effective immediately:

Pursuant to section 8572 of the California Emergency Services Act, is ordered that the contracts and trades in the market for the sales and purchases of forward contracts and trades for electricity (known as the "Block Forward" market) for the delivery of electricity possessed by Pacific Gas and Electric Company, a corporation organized and existing under the laws of the State of California with its principal place of business in California, and subject to actions, including liquidation, by the California Power Exchange Corporation, a non-profit public benefit corporation organized and existing under the laws of the State of California, is hereby commandeered by the State of California to be held subject to the control and coordination of the State of California.

I FURTHER DIRECT that as soon as hereafter possible, this order be filed in the Office of the Secretary of State and that widespread publicity and notice be given to this order.

[SEAL] **IN WITNESS WHEREOF** I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this the thirty-first day of January 2001.

/s/ Gray Davis

Governor of California

APPENDIX H

California Power Exchange Corporation
FERC Electric Tariff Original Sheet No. 39
Third Revised Volume No. 1

19.6 Applicable Law and Forum.

This Tariff shall be governed by and construed in accordance with the law of the State of California, except its conflict of laws provisions; provided however, that if a party is a federal entity that party shall be governed by applicable federal law. PX Participants irrevocably consent that any legal action or proceeding arising under or relating to this Tariff to which the PX ADR Procedures do not apply shall be brought either in a court of the State of California, a federal court of the United States of America located in the State of California, or, with respect to federal entities, a federal court of competent jurisdiction. PX Participants irrevocably waive any objection that they may have now or in the future to courts located in the State of California or, in the case of a federal entity, such other courts consistent with applicable federal law, as the proper and exclusive forum for any legal action or proceeding arising under or relating to this Tariff.

Effective: June 7, 2000
Issued by: Scott Rasmussen, General Counsel
Issued on: August 2, 2000

APPENDIX I

CalPX Trading Services — First Revised Sheet No. 48
Second Revised Rate Schedule FERC No. 1 — Superseding Original Sheet No. 48

12.6 *Applicable Law and Forum.* These CTS Trading Rules shall be governed by and construed in accordance with the law of the State of California, except its conflict of laws provisions; *provided, however,* that if a party is a federal entity that party shall be governed by applicable federal law. Each CTS Participant irrevocably consents that any legal action or proceeding arising under or relating to these CTS Trading Rules to which *Section 7* of these CTS Trading Rules does not apply or which are not subject to the exclusive jurisdiction of FERC shall be brought either in a court of the State of California, a federal court of the United States of America located in the State of California, or, with respect to federal entities, a federal court of competent jurisdiction. Each CTS Participant irrevocably waives any objection that they may have now or in the future to courts located in the State of California or, in the case of a federal entity, such other courts consistent with applicable federal law, as the proper and exclusive forum for any legal action or proceeding arising under or relating to these CTS Trading Rules and the CTS Participation Agreement.

Effective: August 1, 2000
Issued by: Scott Rasmussen, General Counsel
Issued on: June 7, 2000